Porta-King Building Systems, Division of Jay Henges Enterprises, Inc. *and* Carpet, Linoleum, Hardwood & Resilient Tile Layers' Local Union No. 1310, affiliated with Carpenters District Council of Greater St. Louis, AFL–CIO. Case 14–CA–21554

February 26, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 29, 1992, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a response brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally laying off five employees on June 25, 1991. We agree.[2] The Respondent contends that any remedy should be limited because of the Union's conduct after being informed of the layoffs. In finding no merit in this contention, we distinguish *American Diamond Tool*, 306 NLRB 570 (1992), in which the Board held that a union may be found to have waived its right to bargain over economic layoffs while negotiating its initial contract with an employer.[3]

In *American Diamond*, the Board relied on several factors to find the union waived its right to bargain over economic layoffs. The Board observed that the union could have objected to the layoffs at the parties' initial bargaining session, but did not raise the issue at that or subsequent sessions. Also, the Board noted that the union actually proposed a management-rights provision that, if implemented as part of a complete contract, would have permitted the employer to make the layoffs without consulting the union, and that the employer tentatively accepted the proposal. The Board concluded that the union could have requested bargaining but failed to do so and instead ''expressly signalled its willingness to permit such conduct in the future.'' Id. at 571.

Here, the Union has proposed no contract language comparable to the proposal in *American Diamond*. Further, the Union requested information related to the layoffs. Accordingly, in contrast to *American Diamond*, we do not find the Union's conduct an express signal of a willingness to permit the Respondent's conduct in the future.

The Respondent further contends that its August 29, 1991 offer to bargain with the Union tolled its backpay liability.[4] Assuming, without deciding, that the Respondent's August 29, 1991 communication constituted a good-faith offer to bargain, we find that it would not be appropriate to toll the Respondent's backpay liability.

In light of our finding that the Respondent violated Section 8(a)(5) and (1) of the Act, we are authorized, under Section 10(c), to issue an order requiring ''such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.'' Our task in applying Section 10(c) is ''to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.'' *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1975).

Here, had the Respondent acted lawfully, it would have provided the Union with an opportunity to bargain *before* changing employee terms of employment. An offer to bargain over layoffs *after* they have occurred is no substitute for such prior notice. Once the layoffs have taken place and unit jobs lost, the union's position has been seriously undermined and it cannot engage in the meaningful bargaining that could have occurred if the Respondent had offered to bargain at the time the Act required it to do so. Indeed, in cases involving unlawful unilateral changes, the Board's normal remedy is to order restoration of the status quo ante as a means to ensure meaningful bargaining, and this policy has been approved by the Supreme Court. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Therefore, we find that the Respond-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the Respondent's layoff of five employees without first bargaining with the Union was in violation of Sec. 8(a)(5) of the Act, we find it unnecessary to discuss the propriety of the judge's citing *Lapeer Foundry & Machine*, 289 NLRB 952 (1988). See *Holmes & Narver/Morrison-Knudsen*, 309 NLRB 146, 147 fn. 3 (1992).

[3] Member Devaney agrees that the Union did not waive its right to bargain over the layoffs at issue. However, he finds it unnecessary to distinguish the facts in *American Diamond*, a case in which he dissented, from the circumstances presented here.

[4] The text of the letter from the Respondent's president to the Union reads as follows:

> This letter is to advise you that, even though Porta-King Building Systems intends to contest the allegation raised in the above referenced unfair labor practice charge, we are still willing to meet and discuss with you over the layoffs that occurred on June 25, 1991, as well as over any other subjects that you may wish to address. If you want to arrange such a meeting, please feel free to contact me.

ent's offer to bargain about the layoffs after they occurred is insufficient to ''undo the effects of [the violation] of the Act,'' *NLRB v. Seven-Up Bottling Co.*, 344 U.S 344, 346 (1953), and does not toll the Respondent's backpay liability. Accordingly, we agree with the judge that ordering the Respondent to bargain with the Union over the layoffs, as well as reinstating the laid-off employees with full backpay, constitutes the appropriate remedy for the Respondent's violation of the Act. See *Synergy Gas Corp.*, 309 NLRB 179 (1992).[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Porta-King Building Systems, Division of Jay Henges Enterprises, Inc., Earth City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) To the extent it has not already done so, offer to Jerry Fisher, Wilber Hartsell, Paul Henke, Chris Leonard, and Charles David Orick full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and benefits suffered by them by reason of the unlawful actions found herein, in the manner set forth in the remedy section of this decision.''

2. Substitute the attached notice for that of the administrative law judge.

[5] In support of its tolling argument, the Respondent relies principally on *United Gilsonite Laboratories*, 291 NLRB 924 (1988), but we find that the Respondent reads that case too broadly. Although *United Gilsonite* indicates that backpay liability might be tolled if a ''union fails to commence negotiations within 5 days of receiving the employer's notice of desire to bargain,'' id. at 925, *United Gilsonite* must be understood in its context. In that case, the General Counsel did not request a full status quo ante remedy, and the Board tailored a remedy consistent with the more limited one the General Counsel sought. *United Gilsonite* does not represent a general retreat from the basic principle that restoring the status quo ante is the normal remedy in cases of unlawful unilateral changes.

The Respondent also excepts to its obligation to offer reinstatement and backpay to two employees who allegedly quit voluntarily on being notified of their layoffs. We leave to compliance the question of how much, if any, backpay is owed these employees.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally lay off employees without providing Carpet, Linoleum, Hardwood & Resilient Tile Layers' Local Union No. 1310, affiliated with Carpenters District Council of Greater St. Louis, AFL–CIO, with notice and an opportunity to bargain about the decision to lay off employees and the effects of that decision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Carpet, Linoleum, Hardwood & Resilient Tile Layers' Local Union No. 1310, affiliated with Carpenters District Council of Greater St. Louis, AFL–CIO, concerning the decision to lay off employees on June 25, 1992.

WE WILL, to the extent we have not already done so, offer to Jerry Fisher, Wilber Hartsell, Paul Henke, Chris Leonard, and Charles David Orick full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and benefits suffered by them by reason of our unlawful actions, less any net interim earnings, plus interest.

PORTA-KING BUILDING SYSTEMS, DIVISION OF JAY HENGES ENTERPRISES, INC.

Kathy J. Talbot-Schehl, Esq., for the General Counsel.
Ralph Edwards, Esq. and *Craig J. Hoefer, Esq. (Greensfelder, Hemker & Gale P.C.)*, of St. Louis, Missouri, for the Respondent.
Jay Bond, Esq. (Diekemper, Hammond, Schinners, Turcotte and Larrew), of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On a charge filed August 7, 1991,[1] amended August 30, by Carpet, Linoleum, Hardwood and Resilient Tile Layers Local Union 1310 (the Union), a complaint was issued on August 30 alleging that Porta-King Building Systems, Division of Jay Henges Enterprises, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by laying off five employees[2] without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees.[3] Respondent denies violating the Act. As an affirmative defense, Respondent alleges that it acted in accordance with a longstanding, established past practice with the Union under which Respondent has been allowed to lay off employees without prior notice to or bargaining with the Union.

A hearing was held in St. Louis, Missouri, on December 3. On the entire record in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with its principal office in Earth City, Missouri, and a manufacturing facility in Montgomery City, has been engaged in the manufacture and nonretail sale of portable buildings and related products. The complaint alleges, the Respondent admits, and I find that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in unless stated otherwise.

[2] Jerry Fisher, Wilber Hartsell, Paul Henke, Chris Leonard, and Charles David Orick.

[3] The following employees constitute the involved unit:

> All production, maintence and warehouse employees, including leadmen, employed at the employed at the Employer's Montgomery City, Missouri facility, EXCLUDING all office clerical and professional employees, guards, and supervisors as defined in the Act.

An amended charge was filed on September 16 by the Union which charge reiterated the allegation regarding the aforementioned layoffs and also alleged that Respondent discharged four employees and transferred another employee, all without notifying the Union or giving it an opportunity to bargain over these actions. The Union subsequently withdrew this charge to the extent that it refers to discharges and a transfer.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

In 1990 Respondent relocated its manufacturing facility approximately 60 miles from Earth City to Montgomery City. For more than 20 years Respondent and the Union were parties to successive collective-bargaining agreements at the former facility. The last agreement was effective from May 1 until Respondent closed its Earth City production facility in the last quarter of 1990.[4]

The parties stipulated, Joint Exhibit 1, that ''[a]t no time since commencing operations at its Montgomery City facility, have employees who were previously employed at Respondent's Earth City, Missouri facility, constituted more than 25 percent of the bargaining unit workforce at the Montgomery City facility.''

At the outset, Respondent set its own terms and conditions of employment at Montgomery City. In comparison to what employees had at Earth City, the wages were lower, the holidays were fewer, and there were different attendance and health insurance policies.

After a petition and election, the Union was certified on April 8 as the exclusive collective-bargaining representative of Respondent's employees in the above-described unit at Montgomery City. (G.C. Exh. 3.) Steve Shulte, Respondent's president, testified that Respondent did not change its terms and conditions of employment when the Union was certified so that they were the same as those at Earth City.

On April 12 Respondent and the Union held their first negotiating session.

During a telephone conversation on May 29, Union Business Representative Eddie Johns mentioned to Shulte, that he heard rumors of a layoff at Respondent's Montgomery City facility. Shulte stated only that there had been a downturn in business.

On June 4 the second negotiating session was held. Respondent presented a proposed contract to the Union (G.C. Exh. 5). Unlike the last collective-bargaining agreement between Respondent and the Union at Earth City, Respondent's proposed contract did not contain a union-security clause, and it contained drug testing provisions and limited union representatives' access to the plant. Also, under Respondent's proposal, pay would be lower at Montgomery City than what the employees at Earth City received.

On June 25 Orick, who was employed by Respondent at its Montgomery City facility, was injured and left work early. The following day he returned to Respondent's facility with a doctor's excuse and he was asked to fill out an accident report. Respondent's plant manger, Steve Roth, told him and gave him a notice (G.C. Exh. 2d), which indicated that he was laid off effective June 25. Respondent also gave layoff notices to four other employees for June 25. See General Counsel's Exhibit 2. The parties stipulated that the June 25

[4] The agreement contains a termination date of April 30, 1992, but it contains a provision which indicates that the Company has notified the Union that the Company's production facility in Earth City will be closed and this was expected to occur on or before the expiration date of agreement. G.C. Exh. 4. The Union's request, made during negotiations, that this agreement continue in effect at Montgomery City was denied by Respondent.

layoffs were economic layoffs and that the Respondent did not notify the Union prior to the layoffs.[5] (Jt. Exh. 1.)

Shulte testified that he told Johns of Orick's layoff and the layoff of four other employees during a telephone conversation on June 26, and that this was the second telephone conversation about Orick's 3-day disciplinary suspension.[6] Johns testified that he had no recollection of any such telephone conversation.

On June 27 Orick informed Johns of his layoff and he mentioned that other employees may have been laid off on June 25.

On July 24 the Respondent and the Union held their third negotiating session. Orick's layoff and Respondent's proposed contract were discussed.[7]

In late July and early August, Leonard and Henke, respectively, were recalled to their former positions.

As noted above, the Union filed a charge on August 7. It alleged that Orick had been unlawfully laid off and it indicated that ''[o]n information and belief other employees had been laid off in a similar fashion.''

On August 14 Johns requested Respondent to provide the Union with a list of all employees and their current employment status with Respondent.

Shulte testified that he forwarded the following letter to Johns on August 29:

> This letter is to advise you that, even though Porta-King Building Systems intends to contest the allegations raised in the above referenced unfair labor practice charge, we are still willing to meet and discuss with you over the layoffs that occurred on June 25, 1991, as well as over any other subjects that you may wish to address. If you want to arrange such a meeting, please feel free to contact me.

Also Shulte testified that he never received a reply from Johns. Johns testified that he believed that the Union did reply with a telephone call requesting negotiations. On cross-examination, Shulte testified that at the time of the letter all the employees had not been recalled, Respondent did not offer to recall all the employees and the Board had already indicated that it was going to issue a complaint in this matter.

As noted above, the Union filed an amended charge on August 30. It specifies the names of the five employees laid off on June 25.

On September 11 the fourth negotiating session was held. Respondent gave the Union the list requested on August 14.

On November 25 a fifth negotiating session was held.

B. *Contentions*

The General Counsel, on brief, contends that Respondent's failure to give notice to or bargain with the Union over the decision and effects of the June 25 layoffs violated Section 8(a)(1) and (5) of the Act and that the past practice between the parties, whereby the Respondent did not give notice to the Union prior to a decision to layoff, was extinguished when Respondent relocated its operation and the Board subsequently certified the Union as the exclusive bargaining representative of Respondent's employees at its new location in Montgomery City; that the Board determined in *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), that an economically motivated decision to lay off employees is a mandatory subject of bargaining and consequently obligates the employer to give notice to and bargain with the Union over the decision and the effects of that decision; that it is undisputed that no notice was given to the Union prior to the June 25 layoff; that if Shulte told Johns about the layoffs on June 26 the Union would have included this in its initial charge; that in *Amsterdam Printing & Litho Corp*., 223 NLRB 370 (1976), enfd. 559 F.2d 188 (D.C. Cir. 1977), the Board determined that an employer's practices, prior to the certification of a union as the exclusive collective-bargaining representative of the employees, do not relieve an employer of the obligation to consult with the certified union about changes in wages, hours, and other terms and conditions of employment;[8] that Respondent's past practices at its former location do not relieve it of giving notice to and bargaining with the newly certified representative of its employees at its new facility, especially since Respondent from the outset, refused to apply the old contract at the new location, other past practices which might be beneficial to employees were not applied, and no more than 25 percent of Respondent's new work force was comprised of employees from the old Earth City facility; that it is well established that where employees from the old facility do not constitute a substantial percentage—approximately 40 percent or more—the employer is not obligated to recognize the old employees' bargaining representative; that Respondent wants to have its cake and eat it too in that while Respondent asserts the affirmative defense of past practice as it relates to the obligation to give notice to and bargain with the Union as to Respondent's decision to lay off employees on June 25, Respondent did not reinstate the same wages, number of holidays, health insur-

[5] Shulte testified that Respondent averaged a layoff of 1 to 12 employees a year at its Earth City facility, the Union was never notified and they were never discussed by the Union during the negotiations for the Earth City collective-bargaining agreements. Shulte also testified that to his knowledge the Union never protested those layoffs, and the Union never suggested ant alternatives to those layoffs, and the Union never filed a grievance over those layoffs. The last collective-bargaining agreement for Earth City does not contain specific language regarding a grievance procedure. But Shulte pointed out that Respondent had a pratice of discussing personnel decisions with the Union at its request or at the request of the employee. The Respondent concedes that it occasionally, on its own, rotated schedules or shortened the workweek as an alternative to layoffs. Shulte testified that it was his understanding that Respondent could not change its past practices after the Union was certified and, therefore, Respondent did not notify the Union about the layoffs before they occurred.

[6] About a week earlier Orick had been suspended and Johns had asked Shulte to speak to Orick about his side of the story.

[7] Sec. 2.01 of the Company's originals contract proposal for the employees at Montgomery City, the management-rights clause, vests exclusively in the Company the right to relieve employees from duty because of a lack of work or for other reasons. Shulte testified that although the Union sought to change some other language in the management-rights clause, it did not seek to change the lauguage dealing with layoffs.

[8] The General Counsel also cited *Adair Standish Corp*., 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990), where the Board held that because of the intervention of the bargaining representative, the respondent could no longer continue unilaterally to exercise its discretion with respect to layoffs.

ance, or attendance policies as it had at Earth City; that in view of all that occurred, the past relationship and past practices between Respondent and the Union were extinguished; that the Union's certification in April, over 1 year after operations at the new facility began, signifies the beginning of a new collective-bargaining relationship with all the obligations and responsibilities attached to any parties embarking on a new relationship; that Respondent's waiver defense is meritless in that Respondent's obligation was to give notice prior to the decision to lay off, not when the decision is a fait accompli; that Johns credibly testified that he did not receive notice from Shulte on June 26 about the layoffs; and that the Union did not waive its right to bargain, but rather took steps to bargain more effectively by sending its August 14 request.

The Charging Party, on brief, argues that the Company felt free to and did establish terms and conditions of employment at Montgomery City that were significantly inferior to those at Earth City; that the Company has done everything in its power to eradicate any perceived or actual connection between the Montgomery City and the Earth City facilities; that Respondent should not be allowed to fabricate a link in the operations sufficient to establish a past practice connection; that Respondent's waiver has no merit; that an offer to bargain about layoffs 2 months after the layoffs were effective without a concomitant offer of reinstatement is wholly inadequate; that even if Shulte told Johns of the layoffs on June 26, the alleged notice would have been late; and that since the Respondent and the Union did not even discuss the Company's initial contract proposal until after the layoffs, the sequence of events cannot satisfy the ''meaningful negotiations'' requirement of *Lapeer*, supra.

Respondent, on brief, contends that it was under no obligation to bargain with the Union over the June 25 layoffs since these layoffs were conducted in accordance with a past practice whereby the Company had laid off employees without notice to or bargaining with the Union; that in *Aquaslide 'N' Dive Corp*., 281 NLRB 219 (1986), the Board held that an employer did not violate Section 8(a)(1) and (5) of the Act even though the employer had delayed in notifying the union of employee layoffs since the layoffs had been in accordance with the employer's past practice; that General Counsel's attempt to characterize the bargaining relationship between Porta-King and Local 1310 as being a new one devoid of any past practice ignores the realities of this case; that this case is distinguishable from cases where an employer has claimed the existence of an established past practice in the absence of any prior union relationship; that since the Union failed to act after being informed of the layoffs and Respondent's willingness to bargain over these layoffs any relief available in this case should be limited; and that if backpay liability exists in this case, that liability could not continue beyond 5 days after the Union received the Company's August 29 letter.[9]

[9] The General Counsel has moved to strike a portion of the Respondent's brief arguing that there is no record support for the position Respondent has taken. It is noted that the parties stipulated that the Union withdrew a portion of the last charge it filed herein. On this record, one could only speculate as to why the Union withdrew a portion of that charge. That is what Respondent is doing in this portion of its brief. As such, that portion of its brief is nothing more than argument. Accordingly, the General Counsel's motion to strike is denied.

Analysis

What this case is really about is the involved employees. The Union is there collective-bargaining *representative*. This is a new unit. What the Union did at some other plant at another time as a representative of employees in an altogether different unit obviously cannot be binding on this new unit and the labor organization these employees have chosen to represent them. If Respondent can lay off these employees without giving prior notice to the Union and affording it an opportunity to bargain, it would send a dramatic signal to the employees of the Union's impotence. Respondent knows this. Contrary to the assertion of Respondent, on brief, there was no prior union relationship at Montgomery. Respondent saw to that. Consequently, contrary to the assertion of Respondent, on brief, this case is not distinguishable from cases where an employer has claimed the existence of an established past practice in the absence of any prior union relationship. As the General Counsel argues, Respondent wants to have its cake and eat it too. Respondent began anew at the Montgomery facility with respect to the terms and conditions of employment. But in one regard, when it is to Respondent's advantage, it does not want to begin anew but rather it wants to adopt the old approach. Respondent itself wiped the slate clean when it moved to Montgomery.

A decision to lay off employees for economic reasons is a mandatory subject of bargaining. Consequently, an employer must provide notice to and bargain with the Uuion concerning the decision to lay off bargaining unit employees. *Lapeer Foundry & Machine*, 289 NLRB 952. As concluded by the Board in *Amsterdam Printing & Litho Corp*., supra, an employer's practices, prior to the certification of a union as the exclusive collective-bargaining representative of the employees, do not relieve an employer of the obligation to consult with the certified union about changes in terms and conditions of employment. As noted above, and for the reasons given above, I do not agree with Respondent that the instant case is distinguishable because the Union once represented a unit at another of Respondent's facilities.

Shulte's testimony that he informed Johns of the layoffs on June 26 is not credited. Shulte does not deny that only Orick's layoff, as here pertinent, was discussed at the July 24 negotiating session. If, at that point in time, Johns knew who the other employees were, it would follow that there situation would also have been discussed and the discussion would not have been limited to Orick. And when the Union filed the first charge herein on August 7, it would not have been necessary to state ''on information and belief other employees have been laid off'' if in fact Johns already knew who the employees were. Respondent did not follow a reasonable and expedient course in notifying the Union of the layoffs. Consequently, *Aquaslide 'N' Dive Corp*., supra, is distinguishable for this reason and also because here there is not the compelling economic circumstance which existed in that case, namely respondent there had its assets frozen when it received a notice of bankruptcy.

Respondent's belated expression of a willingness to meet and discuss the layoffs months after the layoffs and after the Board had indicated that it was going to issue a complaint herein, without first attempting to recall or even offering to

recall all of the employees laid off, clearly does not satisfy Respondent's bargaining obligation. Consequently, backpay was not tolled by the August 29 letter.

CONCLUSIONS OF LAW

1. Porta-King Building Systems, Division of Jay Henges Enterprises, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All production, maintenance and warehouse employees, including leadmen, employed at the Employer's Montgomery City, Missouri facility, EXCLUDING all office clerical and professional employees, guards, and supervisors as defined in the Act.

4. By unilaterally laying off five employees on June 25, 1991, without notice to the Union or providing the Union with an opportunity to bargain about such changes, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

5. By the aforesaid unilateral activity, Respondent has interfered with, restrained, and coerced and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated the Act by failing to bargain over its decision to lay off employees, Respondent will be ordered to bargain with the Union concerning the layoff decision and to reinstate the laid-off employees with backpay from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent positions or have secured equivalent employment elsewhere. Backpay shall be based on the earnings that the employees normally would have received during the applicable period, less any net interim earnings, and shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent failed to bargain over the June 25, 1991 layoffs in violation of the Act, Respondent shall be ordered to reinstate Jerry Fisher, Wilber Hartsell, and Charles David Orick and award them backpay as specified above. The Respondent shall award backpay to Paul Henke and Chris Leonard as specified above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Porta-King Building Systems, Division of Jay Henges Enterprises, Inc., Earth City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally laying off employees without providing the Union with notice and an opportunity to bargain about the decision to lay off employees and the effects of that decision.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the decision to layoff employees on June 25, 1991.

(b) Reinstate and make whole those employees laid off on June 25, 1991, for any loss of pay or other employment benefits suffered as a result of its unlawful conduct in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Montgomery City, Missouri facility copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''